No. [redacted]

In the

Supreme Court of the United States

OCTOBER TERM, 1959

KENNETH C. BIVINS,

Petitioner,

v.

GULF OIL CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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August 2, 1960.

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To the United States Court of Appeals for the Fifth Circuit

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Kenneth C. Bivins, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled cause on April 1, 1960, Petition for Rehearing in the said cause having been denied on May 9, 1960.

I.

REPORT OF THE OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 212) (Appendix A, p. 19) is reported in 276 F. 2d 753.

II.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 1, 1960 (R. 243; Appendix B, p. 49). A Petition for Rehearing (R. 246) was timely filed on April 21, 1960. Rehearing was denied on May 9, 1960, (R. 292; Appendix B, p. 50). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

III.

QUESTIONS PRESENTED

1. Whether a United States Court of Appeals may, in arriving at a decision on a case, under its appellate jurisdiction by virtue of diversity of citizenship of the parties, apply substantive law which is in direct conflict with the law of the State, wherein the cause of action arose and from which the case was appealed, as set forth by the highest Court of such State?

2. Whether a United States Court of Appeals, in an action under Federal jurisdiction by virtue of diversity of citizenship of the parties, may disregard the jury's find-

ings, which findings are supported by the evidence, and reverse the Trial Court's judgment for the Plaintiff, and render judgment for the Defendant?

IV.

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

1. The Constitutional provision involved in this case is the Seventh Amendment to the Constitution of the United States reading as follows:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. The statutory provision involved in this case is the *Rules of Decision Act, 28 U. S. C., Section 1652*, which reads as follows:

> "Sec. 1652. State laws as rules of decision.
>
> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

V.

STATEMENT

Petitioner, Kenneth C. Bivins, brought this suit in the District Court of Ward County, Texas, against Respond-

ent, Gulf Oil Corporation, for damages for personal injuries sustained by Petitioner on March 2, 1956, based upon Respondent's failing to warn Petitioner of a hidden danger existing in Respondent's oil well; thereupon, Respondent removed the suit to the United States District Court for the Western District of Texas, Pecos Division, and Petitioner filed his Supplemental Petition. (R. 2-19.) The jurisdiction of the District Court was invoked under 28 U. S. C., Section 1332(a), diversity of citizenship and amount in controversy, the Plaintiff being a citizen of Texas, and the Defendant being a foreign corporation duly incorporated and organized under the laws of the State of Pennsylvania. (R. 3.)

On March 2, 1956, Kenneth C. Bivins, Petitioner, was employed by White Well Service, owned by Ray White. (R. 27.) White Well Service had a contract with Gulf Oil Corporation, Respondent, whereunder White Well Service, as an independent contractor, was to perform certain work on Gulf's oil well leases when called upon to do so. (R. 105.) On March 2, 1956, White received a work order from Gulf's production foreman, Griffin, to perform certain reworking operations (e.g., pull well tubing, change valves, check packer, etc.) on one of the Gulf's wells. (R. 71, 111.) Bivins, with three others including Billy Fine, White's operator in charge of the work for White, were sent to the lease to do this work. (R. 28, 29.)

Upon arriving at the well, the crew commenced its work (R. 29, 43), and Bivins climbed down into the cellar to take a flange off the casing-head (R. 32), the cellar being a hole

in the ground 8′ x 8′ x 8′ containing the well head (R. 30). While attempting to execute this operation, an explosion and fire occurred (R. 34) burning Bivins (R. 37).

The explosion and fire was caused by spontaneous combustion of iron sulfide (R. 79, 81) which ignited gas coming out of the well (R. 60) when Bivins loosened the flange at the well head. The iron sulfide condition in the well could not be determined to exist in any particular well until the well was disconnected and the condition actually observed. (R. 81, 126, 137.) Even so, Griffin, Gulf's foreman, White, and Billy Fine, White's foreman, were aware of the iron sulfide condition in this well. (R. 81, 112, 127.) Bivins neither had knowledge nor had he been warned that the well contained the iron sulfide condition. (R. 36, 67, 127.)

On March 18, 1959, the District Court entered judgment (R. 200) for Petitioner on the jury's verdict in the amount of $14,902.41. The District Court did not enter a written opinion.

Respondent appealed to the United States Court of Appeals for the Fifth Circuit. On April 1, 1960, the Fifth Circuit reversed the judgment of the District Court and rendered judgment for Respondent (R. 243; Appendix, p. 49). In its Opinion (Appendix A, p. 19) the Fifth Circuit:

1. Found that the evidence supported all findings of fact of the jury as to failure to warn, necessary to support the District Court's judgment, except as to

negligence with respect to warning (infra, 4), to-wit:

(a) "* * * the premises contained an inherent, concealed or latent danger * * *

(b) "* * * of which Bivins was without knowledge. Under such a factual situation there arose a duty of Gulf to warn Bivins * * *

(c) "* * * No warning was given directly to Bivins by Gulf or by anyone else * * *

(d) "* * * Warning was given to White (Bivin's employer) and to White's foreman under whose direction Bivins was working * * *

(e) "* * * The igniting flame came, it might be inferred, from iron sulfide contained in the gas in the well. Iron sulfide sometimes forms into flakes inside a well and, on being exposed to the air, begins to smolder and burn * * *

(f) "* * * there was an explosion and fire in the cellar and Bivins was badly burned.

(g) "Plaintiff, Kenneth C. Bivins, was employed as an oilfield roustabout by O. R. (Ray) White * * * who operated * * * in the business of reworking oil wells. * * * Bivins was part of a White Well service crew dispatched by Ray White to pull the tubing, change flow valves, check the packer, and check for cave-ins on a Gulf well in Ward County, Texas. * * *"[1]

2. Correctly stated the law of Texas established in 1924 by the Texas Supreme Court, unquestioned since then, and controlling in the instant case, to-wit: The owner or occupier of particular property

[1]Jones, Circuit Judge, 276 F. 2d at p. 757.
[2]Ibid, at p. 755.
[3]Jones, op. cit., at p. 755.
[4]Jones, op. cit., at p. 754.

has a duty *to warn the employees* of an independent contractor, who has undertaken to do work on the property, of dangers that are hidden on or inhere in that property. (276 F. 2d 753, 758);

3. Then, "persuaded by both precedent and principle", which can be found only in non-Texas law, *engrafted its own qualification* onto the Texas law by holding: This duty (supra, 2) is discharged *if those in charge of the work* for the independent contractor *are given warning or have knowledge* of the danger. (276 F. 2d 753, 758);

4. And, then, by applying its own qualification of the law to the facts in the case:

   (a) overruled the jury's finding that Respondent was negligent in failing to warn Petitioner of the hidden danger, and

   (b) found that Respondent was not negligent since Respondent's warning to Petitioner's employer was a legally sufficient warning of the hidden danger. (Appendix A, p. 19.)

In so holding, the Court of Appeals submerged and rejected the landmark case established by the Texas Supreme Court on the point in issue, a case having unparalleled dignity through the years, to-wit: *Galveston-Houston Electric Railway Company, et al. v. Reinle, et al. (S. Ct., 1924), 258 S. W. 803.* (Appendix C, p. 51.)

Instead, the Court of Appeals based its decision on extraneous sources: to-wit: A Texas Court of Civil Appeals case, in point neither on the facts nor on the law; a student

Nance Exploration Company v. Texas Employers' Ins. Ass'n, 305 S. W. 2d 621 (Ref., N.R.E.); Cert. Den., 358 U. S. 142, 3 L. Ed. 2d 229, 79 S. Ct. 235.

law review article[4]; a New York case[5]; and the language of a textbook.[6] Judge Brown in his dissenting opinion (Appendix A, p. 34a) (276 F. 2d at pp. 762, 766) discusses the applicability of these sources; and, with respect to *Nance* he says in part:

> "* * * Nance had a whole series of grounds for holding the alleged vicarious occupier not liable as a matter of law * * *.
>
> "The notation of the (Texas) Supreme Court 'Refused N. R. E.' (no reversible error) in refusing to grant a writ of errror and review Nance indicates that Supreme Court action was confined merely to an approval of the *result*, not an approval of the reasons or the Court's opinion as would be the case with a writ denied 'Refused'. Hence the Supreme Court could have approved the *result* on any number of the reasons advanced for the decision * * *"[7] (Emphasis added.)

The Court of Appeals set out three other reasons why the judgment of the District Court should be reversed (276 F. 2d at pp. 758, 759, and 761); however, none of these reasons, even if correct, would require that the judgment of the District Court be rendered; and, most importantly, none of these reasons affects the extreme peril in which

[4] "Comment, The Duty to Furnish a Safe Place to Work to the Independent Contractor and His Servants", 11 Baylor Law Review 170.

[5] *Storm v. New York Telephone Co.*, 270 N. Y. 103, 200 N. E. 659.

[6] 1 Sherman & Redfield on Negligence, Rev. Ed. 66, Sec. 26.

[7] Rule 483, Texas Rules Civil Procedure:

> "In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the Court are correctly determined, the Supreme Court will refuse the application with the docket notation 'Refused'. In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the notation 'Refused. No Reversible Error'. * * *."

invitees in Texas are placed as a result of the action of the Court below in rejecting the *Reinle* case.

On May 9, 1960, the Fifth Circuit denied the Petition for Rehearing. (R. 292; Appendix B, p. 49.)

VI.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is not in accord with the applicable decisions of the Supreme Court of Texas.

The Court of Appeals correctly stated the law of Texas controlling in the instant case, to-wit: The owner or occupier of particular property has a *duty to warn the employees* of an independent contractor, who has undertaken to do work on the property, of dangers that are hidden on or inhere in that property. However, the Court of Appeals *engrafted its own qualification* onto the Texas law by holding: This duty (to warn employees) is discharged if those *in charge of the work* for the independent contractor *are given warning or have knowledge* of the danger. *276 F. 2d 753, 758.*

This is in direct conflict with the law of Texas as set forth by the Supreme Court of Texas in the landmark case of *Galveston-Houston Ry. Co. v. Reinle*,[1] *(1924) 258 S. W.*

[1] Reinle was an employee of an independent contractor; the latter had contracted with Defendant to construct a portion of a causeway being built by Defendant; the independent contractor had knowledge of the extreme danger created by Defendant's overhead high-tension wires; contact with the wires through a boom caused *Reinle*'s death; and *Reinle* was not warned of this danger by anyone.

803 (Appendix C, p. 51), wherein in answer to a certified question the Court held:

> "The Court answers that *it was the duty of the* interurban company *(occupier) to exercise ordinary care to give Reinle* notice or *warning of the danger* of the boom coming in contact with, or in close proximity to, the uninsulated high-voltage wires, *notwithstanding Reinle was an employee* not of the interurban company but *of the independent contractor, who possessed full knowledge of the danger.*" (Emphasis added.) (Appendix C, p. 59; *258 S. W. 803, 806.*)

Reinle has never been questioned, much less overruled, while being cited 17 times, four (4) times by the Court of Appeals for the Fifth Circuit. As recently as June, 1960, the Texas Supreme Court cited *Reinle* with approval, distinguishing it on the facts, in *Houston Lighting and Power Co. v. Brooks, 3 Tex. Sup. Ct. Journal 387,* S. W. 2d (Appendix E, p. 63) (unreported at this time). The history of *Reinle* is set out in Appendix D, p. 59-60.

What is the "ordinary care to give warning" as required by *Reinle?* The Texas Supreme Court reiterated its answer to this in *Smith v. Henger (1950), 226 S. W. 2d 425, 431,* citing *Reinle* as authority, by holding:

> "Where the duty to keep premises in a safe condition is imposed on a person in control of them, this duty may include the duty * * * to *warn such persons of the existence of dangers* which could not reasonably be expected to be apparent or obvious. * * *. The *standard by which this duty is measured is* that of *reasonable care*, and *whether the duty has been properly discharged depends on the facts of each case.*" (Emphasis added.)

The District Judge applied this law in his charge (R. 156-169), and the jury found, under the facts and circumstances of the case, that Respondent was negligent in failing to warn Petitioner.

Furthermore, it is clearly the Texas law[1] that the employer's negligence will not be imputed to his employee.

On this point *Reinle* held:

> "• • • It is the breach of the interurban Company's (occupier's) own duty for which it is answerable. Failure of the (independent) contractor to perform its duty would in no wise relieve the interurban company from responsibility for the consequences of failure to perform its own duty to the contractor's employees." *258 S. W. 803, 805.*

That *Reinle* should be accorded controlling weight here is clear since (paraphrasing the language of Mr. Justice Douglas in *Bernhardt v. Polygraphic Co., 350 U. S. 198, 204-5*) no fracture in the rule announced in that case has appeared in subsequent rulings or dicta, no legislative movement is underway in Texas to change the result of that case, there is no confusion in the Texas decisions; and there "is no developing line of authorities that casts a shadow over the established ones."

Since the Court of Appeals did not follow the law of Texas, under the principles established in *Erie R. Co. v. Tompkins* a typical situation is presented in which this Honorable Court has on a number of occasions granted

[1] *Gartelmer v. Galveston, H. & S. Ry. Co. (1893), 24 S. W. 671, on reh. 29 S. W. 929, err. ref.*; 30-B Texas Jurisprudence 207; Negligence, Sec. 94, Imputed Knowledge.

Writs of Certiorari. *Russell v. Todd, 309 U. S. 280; Wichita Royalty Co. v. City National Bank, 306 U. S. 103; Guaranty Trust Co. v. York, 320 U. S. 99; Gibson v. Phillips Petroleum Co., 352 U. S. 874.* See also *Rules of Decision Act, 28 U. S. C., Section 1652.*

In *Byrd v. Blue Ridge Rural Elec. Corp., 356 U. S. 525, 536,* Mr. Justice Brennan discusses *Cities Service Oil Co. v. Dunlap, 308 U. S. 208,* a case quite similar to the instant case in that the Fifth Circuit refused to apply Texas law, and one graphically high-lighting the reason why the writ prayed for herein should be granted. In the *Cities Service* case the Fifth Circuit recognized the existence of the Texas rule, as claimed, but thought a different and better one was generally approved and should be followed. *308 U. S. 208, 211.* The Fifth Circuit did the same thing here by choosing to apply and predicating its decision on *Storm v. New York Telephone Co., 270 N. Y. 103, 200 N. E. 659,* a New York case, which can be the only "precedent and principle" which persuaded the Majority below.

The reason stated in the dissenting opinion in *Gibson v. Phillips Petroleum Co., 352 U. S. 874,* why certiorari should have been denied there, is all the more reason why this writ should be granted. There, Mr. Justice Frankfurter, joined in his dissent by Mr. Justice Harlan, said:

> "While the particular judges (Fifth Circuit) who heard the case are not from Texas, they are, however, constantly charged in such cases as this with the task of being conversant with, and applying, Texas law." *352 U. S. 874, 875.*

Here, U. S. District Judge R. E. Thomason, formerly a Texas lawyer, in his charge to the jury (R. 156) declared the law to be precisely as urged by your Petitioner. Then, of the Fifth Circuit Court, which reversed and rendered, dissenting Judge John R. Brown is a former Texas lawyer. Hence, of the four (4) Judges who have now ruled in this case, two have ruled as urged by your Petitioner and two have ruled otherwise. The two judges who have ruled favorably for Petitioner are former Texas lawyers with a combined total of more than seventy-five (75) years experience before the Bar of Texas and on the Bench; during practically all of this time they have been concerned daily with Texas law; and they have become acutely aware of the problems, dangers, and risks of the Texas oil and gas industry and its workers, *which is the matter at stake here.* With the highest respect for the majority of the Court below, it is urged that these two Judges, with their vast experience as Texas lawyers, are better equipped to declare the law of Texas as established by the Texas Courts. *Bernhardt v. Polygraphic Co., 350 U. S. 198, 204.*

2. The questions here presented have great importance and far-reaching effect.

Not only in the State of Texas, but in many other States, there are many thousands of individuals performing work for, and on the land of, foreign employers, both individuals, firms, and corporations. Of these individuals, a great number will undoubtedly be injured on premises occupied by the persons, firms, or corporations for whom they are

either directly or indirectly laboring. Certainly, these individuals have the right to have the questions concerning liability for their injuries determined in accordance with the substantive law of the State in which they are working. They should not be subjected to the caprice of a United States Court of Appeals in connection with which the Court of Appeals is allowed to apply whatever rule it sees fit, regardless of the rule of the State forum, in determining the liability for such injuries.

This is particularly true at present in the State of Texas if the decision of the Court of Appeals is allowed to stand. If an individual is injured by the neglect of a foreign individual, firm, or corporation, then liability will be determined by one set of rules as decreed by the Court of Appeals, whereas if the negligence were attributable to a Texas individual, firm, or corporation, the liability would be determined by still another set of rules as decreed by the Supreme Court of Texas. This situation is of such great importance that it should not be allowed to stand.

Any decision by this Honorable Court in this case will, of course, have a pronounced effect on countless cases arising in the Federal Courts in Texas hereafter. With compelling force—both in law and in logic—Judge Brown in his dissent below *(276 F. 2d 753, 761)* states that the rule announced by the majority below * * * "transcends this case and is and will be—so long as it stands—a formidable lessening of the duty of an occupier to exercise reasonable care to make premises safe for employees of independent

contractors". To appreciate the significance of this to the people of Texas, it must be understood that there are many thousands of oil and gas wells in Texas owned by foreign oil operators; that each of these wells is drilled, and reworked (cleaned out, reperforated, etc.) many times during its life, by independent contractors having, aggregately, thousands of employees; and that, due to the extremely hazardous conditions encountered in this work, including hidden dangers on the land or in the wells, hundreds of these independent contractors' employees are injured, maimed, or killed each year.

3. The action of the Court of Appeals constituted an invasion of the province of the jury contrary to the Seventh Amendment of the United States Constitution.

As yet set forth in the statement hereof, the evidence clearly raised the issue of whether or not Respondent failed to exercise "ordinary care" when it did not warn Petitioner of the hidden danger, from which evidence the jury was entirely justified in making a finding favorable to Petitioner.

The District Judge in his charge (R. 157-162) applied the law of Texas as to "warning", "negligence", and "ordinary care"; as established by *Reinle* and the authorities which have evolved from it. Under this charge the jury found that Respondent was negligent, under all the facts and circumstances, in failing to warn Petitioner about the hidden danger which caused his injuries. Then, after giving lip-service to the law of *Reinle*, the Court of Appeals

held *as a matter of law* that Respondent *exercised ordinary care* by warning Petitioner's independent-contractor employer about the hidden danger and, hence, was not negligent.

The facts in this case present a situation in which this Honorable Court has on numerous occasions granted Writs of Certiorari, for the Court of Appeals certainly invaded the province of the jury when it substituted its own conclusion for that of the jury upon the disputed fact of negligence. *Mary Tennant v. Peoria and Pekin Ry. Co., 321 U. S. 29; E. G. Ives v. Grand Trunk R. Co., 319 U. S. 372; Schulz v. Pennsylvania R. Co., 350 U. S. 523, 882; Gibson v. Phillips Petroleum Company, 352 U. S. 874, reh. den. 352 U. S. 937.*

4. The decision of the Court of Appeals was clearly erroneous.

As is evident from the discussion of the foregoing reasons, the decision of the Court of Appeals was clearly erroneous, since the Court of Appeals failed to apply the law of Texas established by the Texas Supreme Court in the *Reinle* case, and since the jury's finding that Respondent failed to warn Petitioner about the hidden danger on its lease was clearly supported by the evidence. Further, under the evidence and the law of the State of Texas, the District Court correctly submitted the issues concerning "warning" to the jury in its charge.

Therefore for this reason alone, this Honorable Court should grant this Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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August 2, 1960.

APPENDIX

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APPENDIX A

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17843

GULF OIL CORPORATION,

Appellant,

versus

KENNETH C. BIVINS,

Appellee.

Appeal from the United States District Court for the Western District of Texas.

(April 1, 1960.)

Before CAMERON, JONES and BROWN, Circuit Judges.

JONES, Circuit Judge: Plaintiff Kenneth C. Bivins was employed as an oilfield routabout by O. R. White, referred to as Ray White, who operated as White Well Service, in the business of reworking oil wells. Part of White's work was done for the defendant, Gulf Oil

Corporation, under a written contract. Bivins was part of a White Well Service crew dispatched by Ray White to pull the tubing, change flow valves, check the packer and check for cave-ins on a Gulf well in Ward County, Texas. Mr. White acted pursuant to a work order received from Gulf's local production foreman. By custom and under the terms of the contract, Gulf told Mr. White that work needed to be done on a given well but the details of performance and supervisions were left up to White.

The crew of which Bivins was a member arrived at the well site about 3:30 p.m. on March 2, 1956, and began erecting the mast on the pulling unit and disconnecting the well from incoming gas injection lines and outgoing flow lines. The well was then bled so that all gas in the casing could escape. This bleeding process went on for thirty minutes to insure that all the gas had escaped.

After the gas had been bled off, Bivins started to remove the flange from the casing head. To do this he had to go down in a cellar in which the christmas tree was located. This cellar was eight feet deep and eight feet on each side. It was walled with wooden planking and covered with 3x12 timbers. Some of the covering timbers were removed by the crew to allow entrance to the cellar. There being no ladder available, Bivins climbed down the christmas tree and began loosening the bolts on a flange. He called up to the surface for another tool. While he was waiting for it to be handed down to him, there was an explosion and fire in the cellar and Bivins was badly burned.

After recovering workmen's compensations, Bivins brought this action against Gulf. A jury trial was had with the verdict and judgment for Bivins. Gulf prepared its brief in keeping with the Texas state court practice setting forth and then restating, as points, its several specifications of error. Bivins, in his brief, countered with counterpoints and in them stated the converse of the points set forth by Gulf. In turn, Gulf filed a reply brief with seriatim replies to Bivins' counterpoints. Bivins then, in a supplemental brief, reiterated and reargued his counterpoints.

The explosion which injured Bivins apparently resulted from the ignition of gas which somehow got into or remained in the cellar after the bleeding of the casing pressure. The igniting flame came, it might be inferred, from iron sulphide contained in the gas in the well. Iron sulphide sometimes forms into flakes inside a well and, on being exposed to the air, begins to smolder and burn. Although Gulf did not know to a certainty that the well in question had an iron sulphide condition, it did know that there was a possibility that the well was so affected. Gulf, through an employee, had warned Ray White that wells in this area were suspected of containing iron sulphide. Both Gulf and White, on the day of the accident, warned the chief of Bivins' crew to watch for such a condition on the well in question. This warning was not directly communicated to Bivins.

The trial court instructed the jury that if Gulf failed to warn Bivins of the dangerous condition, and this failure

was negligence, and a proximate cause of Bivins' injuries, Gulf would be liable for the damages suffered by Bivins.[1] Gulf requested an instruction which would have absolved it of liability if it were found that Gulf had warned Bivins' employer of the condition. The request was refused and this refusal is assigned as error.

At this point it may be observed that an owner or occupier of property is not liable for injury to the employee of an independent contractor or sub-contractor in the absence of negligence on the part of the owner or occupier which caused or contributed to the injury. *Humble Oil & Refining Co. v. Bell*, Tex. Civ. App., 180 S.W.2d 970; *Union Tank & Supply Co. v. Kelley*, 5th Cir. 1948, 167 F.2d 811. It is sometimes said that the owner or occupier is under a duty to furnish a safe place to work for the employee of the independent contractor. This statement is too broad and is an oversimplification of the principle. More accurately phrased, the rule requires the owner or occupier to exercise ordinary care to keep the premises in a reasonably safe condition so that the employee will not be injured. *Robert E. McKee, General Contractor v. Patterson*, 153 Tex. 517, 217 S.W.2d 391; *Smith v. Henger*, 148 Tex. 456, 226 S.W.2d 425, 20 A.L.R. 2d 853. Even as so stated, the rules is subject to qualifications as will be noted.

[1]The charge read: "You are instructed that if you find from a preponderance of the evidence that the Defendant, Gulf Oil Corporation, through its employees, failed to warn the Plaintiff, Kenneth Bivins, of a dangerous condition to which he was subjected, if any, and if you further find and believe from a preponderance of the evidence that the failure of such employee, if any, to warn the said Kenneth Bivins of the danger, if any, to which he was subjected constitutes negligence, and that such negligence, if any, was a proximate cause of the Plaintiff's injuries and damages, then you will find for the Plaintiff * * *."

Whether or not there is responsibility for the condition of the place of work may depend upon the control of the premises and the control over the conduct of the work by the person against whom liability is asserted. *Rowsth & Gencoor Production Co. v. White*, 152 Tex. 619, 262 S.W.2d 99; *Houston Pipeline Co. v. Peddy*, Tex. Civ. App., 292 S.W.2d 364; *Sunray Oil Corporation v. Albritton*, 5th Cir. 1951, 187 F. 2d 475, reh. den., 188 F. 2d 771, cert. den. 342 U.S. 828, 72 S. Ct. 51, 96 L. Ed. 626; *Gulf Oil Corporation v. Wright*, 5th Cir. 1956, 236 F. 2d 46. It has been said that in the absence of control there is no duty. *Nance Exploration Co. v. Texas Employers' Insurance Association*, Tex. Civ. App., 305 S. W. 2d 621, cert. den. 358 U. S. 132, 79 S. Ct. 235, 3 L. Ed. 2d 229. The district court here assumed, in its charge to the jury, that Gulf retained such control as cast upon it the obligation of an owner or occupier, although the question of control was not mentioned in the charge. However, Gulf did not, in this case, retain control of the premises and had no representative present at the site of the work. In this respect the situation differs from that in the Albritton and the Wright cases, and it will be noted that in the latter case one of the judges of this Court in a specially concurring opinion, thought the control was not such as to create liability. In the Nance case Gulf Oil Corporation was the lessee of the owner and it had entered into an agreement for exploration work with an independent contractor which, in turn, made an agreement for a part of the work with a sub-contractor whose employee was in-

jured. There the court directed a verdict for Gulf which had an oil and gas lease from the landowner as it has in this case.

The statement in the Nance case that in the absence of control there is no duty perhaps went beyond the necessities of that case and may be subject to qualification even though it be a good statement of the general rule. There is a distinction between an unsafe condition incident to or resulting from the work to be done and an unsafe condition inhering in the premises where it is to be done. We think it would be an unsound rule that would relieve the owner or occupant of liability for a concealed or latent condition of danger not incident to the work to be done, merely by surrendering control to an independent contractor. This distinction is pointed out in *Moore v. Texas Company*, Tex. Civ. App., 299 S.W. 2d 401. There it was held that the owner of the premises where work is to be done is under no duty to the employee of an independent contractor to give him warning of transitory dangers which might arise during the performance of the work, but the court recognized that there might be such a duty where the danger arose from the condition of the premises. The owner or occupier of premises has a duty to warn the employee of an independent contractor of hidden or inherent dangers. *Smith v. Henger, supra; Roosth v. Genecov Production v. White, supra.* Gulf, as lessee of the premises, stands as an owner or occupier of the premises in its relation to White and Bivins. The duty of the owner or occupant does not extend to the employees of the sub-con-

tractor who know or should know of the existence of a particular condition and who appreciate or should appreciate its dangers. *Robert E. McKee v. Patterson, supra.*

The liability of the owner or occupier of the premises which harbors a latent, concealed, or inherent defect, to the employee of an independent contractor is not absolute and unconditional. It may be discharged by a warning. As set forth in the Restatement,

> "A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he
>
> (a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and
>
> (b) has no reason to believe that they will discover the condition or realize the risk involved therein, and
>
> (c) invites or permits them to enter or remain upon the land without exercising reasonable care
>
> (i) to make the condition reasonably safe or,
>
> (ii) to give a warning adequate to enable them to avoid the harm without relinquishing any of the services they are entitled to receive, if the possessor is a public untility." Restatement, Torts § 343.

This section of the Restatement has had judicial approval in *Smith v. Henger, supra; Houston National Bank v. Adair*, 146 Tex. 387, 207 S.W.2d 374; and *Gulf Oil Corporation v. Wright, supra.* We do not understand that Bivins contends that Gulf could not have discharged any

duty it may have had to him by a warning. The evidence, we think, would support the findings of the jury that the premises contained an inherent, concealed or latent danger of which Bivins was without knowledge. Under such a factual situation there arose a duty of Gulf to Bivins. No warning was given directly to Bivins by Gulf or by anyone else. Warning was given to White and to White's foreman under whose direction Bivins was working. The decisive question then is, was the duty of Gulf to Bivins discharged by the warning given to White and his job foreman?

It has been stated that, "Apparently the Texas Courts consider it sufficient to warn the independent contractor alone in order to discharge the duty of giving warning to the latter's servants, but the matter is open to question." Comment, The Duty to Furnish a Safe Place to Work to the Independent Contractor and His Servants, 11 Baylor Law Review 170. The Texas precedents are few. The earliest of the Texas decisions follows the rule that warning to the independent contractor is enough. It was held in *Proctor v. San Antonio Street Railway Co.*, Tex. Civ. App., 62 S.W. 939, decided in 1901, that the duty to warn rested upon the independent contractor, he having knowledge of the danger, to warn his employee, and no such duty rested upon the contractee. In 1924 the Texas Supreme Court, answering a certified question, announced a contrary doctrine in these words:

> "The court answers that it was the duty of the interurban company to exercise ordinary care to give

> Reinle notice of warning of the danger of the boom coming in contact with, or in close proximity to, the uninsulated high-voltage wires, notwithstanding Reinle was an employee not of the interurban company, but of the independent contractor, who possessed full knowledge of the danger." *Galveston-Houston Electric Ry. Co. v. Reinle*, 113 Tex. 456, 258 S.W. 803, 806.

It is suggested in the Baylor Law Review comment from which we have quoted, that the Reinle case may be distinguished on its facts. Whether so or not, the case has not been followed in recent decisions. *Nance Exploration Co. v. Texas Employers' Insurance Association*, *supra*, was a case involving exploration work by an independent contractor for the lessee under an oil and gas lease. Uninsulated high voltage lines were present as a danger. The danger was known by Bailey, the overseer of the independent contractor, and by Greer, a driller under whom one Flowers worked as a helper. Flowers, who disclaimed knowledge that the line was an electric power line, drove a truck carrying a thirty-five foot upright drilling mast into the line and was injured. The factual situation was not wholly unlike that in Reinle. Among several grounds for rendering judgment for the contractee, the court held:

> "Furthermore, if appellee was entitled to warning of the danger, he had received that warning because his superior Bailey, under the undisputed evidence, knew of said danger and, under the undisputed evidence, had warned Greer of the danger. Therefore, both of appellee's superiors knew of the danger, and, under the last quotation from McKee v. Patterson, supra, that amounted to knowledge of the danger on the part of the appellee." 305 S.W. 2d 621, 626.

This Court has reached the same conclusion in *Union Tank & Supply Co. v. Kelley*, 5th Cir. 1948, 167 F. 2d 811, where it was said:

> "We agree, too, that under the disputed facts, the duty was on plaintiff's employer and not on the defendant to warn plaintiff of the dangers of working with steel at night and to furnish him with adequate lighting and that if there was any negligence in the discharge of this duty it was the negligence not of defendant but of Wimberly, plaintiff's employer, and it was error to charge these issues to the jury." 167 F. 2d 811, 815.

The foregoing language was quoted with approval in the Nance Exploration Co. case, *supra*.

Text approval of the rule has been thus given, "Warning to the superiors in employment of a person is warning to that person, the employment relation permitting a reasonable assumption that such notice will be communicated in the ordinary course to all employees on the work." 1 Sherman and Redfield on Negligence, Rev. ed. 66, §26. The sound reason for such a rule has been stated in a New York case where notice of the danger had been given to the foreman but not to the employee who received fatal injuries while on the job. The court said:

> "Warning of danger was thus given to all men in charge of the work and to all supervisory officials of the decedent. * * * To require the defendant to bring notice home to every employee of the lighting company who might possibly be involved on this job on penalty of otherwise failing in duty exceeding reason-

> able bounds. * * * The employee has placed himself in a relationship where it may be reasonably assumed that notice to his supervisory officials will be communicated in the ordinary course to all employees on the work." *Storm v. New York Telephone Co.*, 270 N.Y. 103, 200 N.E. 659.

The same principle is stated in *Schwarz v. General Electric Realty Corporation*, 163 Ohio St. 354, 126 N.E. 2d 906; *Hotel Operating Co. v. Saunders' Adm'r.*, 283 Ky. 345, 141 S.W.2d 260. The Storm case and its holding have been approved in *Whitlow v. Seaboard Air Line Railroad Co.*, 4th Cir. 1955, 222 F. 2d 57, and *Florida Power and Light Co. v. Robinson*, Fla. 68 So. 2d 406. See also *American Mutual Liability Ins. Co. v. Chain Belt Co.*, 224 Wis. 155, 271 N.W. 828.

We are persuaded by both precedent and principle that the owner or occupier of particular property has a duty to warn the employees of an independent contractor who has undertaken to do work on the property, of dangers that are hidden on or inhere in that property, and that this duty is discharged if those in charge of the work for the independent contractor are given warning or have knowledge of the danger. This conclusion is not in conflict with that which was decided in *Gulf Oil Corporation v. Wright*, *supra*. It was error, therefore, for the court to give the quoted instruction.

The district court submitted two other theories of liability to the jury. One of these was put by an instruction which made an issue of negligence liability based on whether Gulf failed to discover the presence of iron sulphide in the well. Since, as we have shown, Gulf knew of the possibility that iron sulphide was in the well, Gulf would not be liable for a failure to discover the dangerous condition unless it further failed, because of its ignorance or neglect, to warn of the presence of the condition. As is stated in 30 B Texas Jurisprudence, 255, Negligence § 60.

> "Where the defendant owner was 'negligent,' in the sense that he knew or ought to have known of the danger, recovery by the plaintiff depends on the further question as to whether the defendant was 'negligent' in the sense that he could have prevented the calamity * * * as, for instance, by the giving of sufficient warning of the peril."

Since we hold that the warning given by Gulf was a legally "sufficient warning of the peril," any question of negligence in failing to discover the peril warned of becomes immaterial and it was therefore error for the court to charge on this point. See also 38 Am. Jur. 757, Negligence § 97.

"[I]f you find and believe from a preponderance of the evidence that gas or other substance stood in the pipes or casing in question, which was of such a nature as would ignite upon being exposed to air, and that the same constituted a danger, and if you further find * * * that the Defendant Gulf Oil Corporation failed to discover said danger, if any, and that such failure, if any, was negligence * * * and that such negligence if any, was a proximate cause of plaintiff's injuries then you will find for the plaintiff * * *."

The instruction submitting the remaining theory of liability assumes that there was a defective gate valve. This was not admitted and, as we think, was not proved. The instruction actually covers two theories: (1) Failure to remedy or warn of a defective gate valve, and (2) Failure to remedy or warn of the gas. As to the latter, what has already been said is sufficient to show that this charge was erroneous unless it be said that the jury could properly find that only by eliminating the gas condition could Gulf escape liability. To approve such a proposition would be to make Gulf an insurer of Bivins' safety. This is a burden that Gulf was not required to assume. *McElhenny v. Thielepape*, 155 Tex. 319, 285 S. W. 2d 940; 30 B Texas Jur., Negligence § 58.

The theory that Gulf was negligent in maintaining a defective gate valve and failing to warn of its presence or remedy the defect was raised by the pleadings. This theory was not mentioned at the trial except for the quoted portion of the charge. There is no direct evidence whatsoever

"You are also charged that, as a matter of law, the Defendant, Gulf Oil Corporation, is charged with the non-delegable duty of making such inspections, if any, you find and believe from a preponderance of the evidence ordinary and reasonable care would require to determine if the place in which the Plaintiff Kenneth Bivins, was working was in fact a safe place in which to work. In this connection, you are instructed and charged that, if you find and bel[illegible] from a preponderance of the evidence that a reasonable inspection, if made, would have revealed the danger, if any, in the presence of a defective gate valve allowing gas and other substances to leak into the collar in question, if that condition was present, or the presence of a gas or substance in the pipes which would ignite when being exposed to the air, if that condition was present, and if you further find and believe from a preponderance of the evidence that the Defendant failed to remedy such condition, if any, or failed to warn the Plaintiff thereof, and that such failure, if any, was negligence, and that such negligence, if any, was a proximate cause of the injury in question, then you will find for the Plaintiff * * *."

on this point. There is but meager testimony relating to gate valves. To show the significance of this testimony, we review a portion of the evidence.

As has been stated, prior to the explosion, all input and flow lines had been detached from the well, or christmas tree, and the casing had been bled for thirty minutes so that all gas therein would escape. Between the union or joint on the gas input line, which was broken in the bleeding process, and the casing itself, was a section of pipe containing a gate valve. In a deposition taken before the trial, Lawrence Q. Griffin, Gulf's local production foreman, who died prior to the trial, testified concerning his visit to the location shortly after the explosion:

"Q. How long did the fire burn, if you know?

A. Well, I went out there, and then went back in after him; there wasn't any of them there when I got there the first time.

Q. Was it burning?

A. Yes, the boards were burning.

Q. Is that all that was burning when you got there?

A. Yes.

Q. There wasn't any gas burning?

A. There was a little bit coming out of the casing, burning just a little bit.

Q. Out of the casing?

A. Out of the casing, where they parted this union on that gas line, and when they put the boards out with that water, I just slapped my hand over that and put it out. I had gloves on, of

course, as I didn't want to touch that hot metal."

Bivins, in his brief filed with us, interprets this testimony as follows:

> "Evidence as to the defectiveness of one of the gate valves is shown by the testimony of Messrs. Griffin and Fine. Mr. Fine said that Appellee was breaking the flange loose between two gates, and Mr. Griffin said that after the fire occurred he went out to the well and gas was coming out of the line 'where they parted this union on that gas line,' and that he just slapped his gloved hand over it to put it out. Of course, if the gate valves had been closed, as he said it [sic] was, gas could not have been coming out of the line at the broken union, *unless the valve was defective*. The jury had this evidence for consideration."

The quoted testimony of Griffin does not, nor does the testimony of anyone else, state that a gate valve controlling the flow of gas from the casing had been closed. Griffin testified that the valve on the line coming in from an outside pipeline to put gas into the casing for the gas lift system was closed. But this line had been completely disconnected from the well at the time Griffin saw the fire and this testimony has nothing to do with a possibly defective gate valve allowing gas to escape from the casing. Other testimony relating to the opening and closing of valves was given by crew chief Fine. Fine related how the crew bled the pressure off the casing. At the end of his narrative specific questioning resumed:

> "Q. All right. You were in the process of draining the pressure off of the casing, is that correct?
>
> A. Yes, sir.

Q. In other words, whatever gas existed between the casing right here (indicating) and the tubing, all the way down to the bottom of the hole, was bled out, is that correct?

A. Yes, sir.

Q. So that there would be no gas in there?

A. That is right.

Q. Now, is that the usual operation?

A. Yes, sir.

Q. It is necessary to do that before you can pull the tubing, is it not?

A. Yes, sir."

An examination of the evidence shows that it would have been impossible to bleed out "whatever gas existed between the casing * * * and the tubing, all the way down to the bottom of the hole * * *" without opening one or both of the gate valves in the pipes connected to the casing. The testimony of Bivins himself supports this:

"Q. Will you tell the jury what you did when you bled down the well?

A. Well, first we closed the well * * * and screwed out that pressure valve, and I taken off the meter, and then we opened everything up to where it would clear of gases."

Thus the only basis for the instruction upon a defective gate valve was surmise or conjecture. The Texas law is quite clear that in such a case there is no evidence of probative force to go to the jury on the question of negligence.

"To establish a fact by circumstantial evidence, the circumstances relied on must have probative force

> sufficient to constitute the basis of a legal inference; it is not enough that they raise a mere surmise or suspicion of the existence of the fact or permit of a purely speculative conclusion. The circumstances relied on must be of such a character as to be reasonably satisfactory and convincing, or, as it has been said, sufficient reasonably to produce belief of the existence of the fact which is sought to be shown by them. At all events they must not be equally consistent with the nonexistence of the ultimate fact." 17 Tex. Jur. 908, Evidence § 409.

See also *Perron v. Baker Hotel of Dallas, Inc.*, Tex. Civ. App., 228 S.W. 2d 311; *Corpus Christie v. Greff*, Tex. Civ. App., 275 S.W. 2d 547, reversed on other grounds, 289 S.W. 2d 746 (Texas 1956); *Big Three Welding Equip. Co. v. Reeh*, Tex. Civ. App., 301 S.W. 2d 504; *Lynch v. Ricketts*, 314 S.W. 2d 273, 277 (Tex. 1958).

It is shown that it was necessary to open the gate valves in the pipes leading from the casing to bleed off the gas from the casing before pulling the tubing. It is not shown that these gate valves should not have been kept open in furthering the purpose for which they were opened. No reason is advanced as to why they should have been closed.

One other ground remains. The court's charge first discussed was apparently understood by all to be submitting solely the theory that the ignitible gas constituted a "dangerous condition" of which Bivins should have been warned. Bivins contended that Gulf was negligent in failing to provide an escapeway from the cellar and there was testimony that, contrary to custom, no ladder was provided on the well in question. This theory was not given to

the jury in the charge unless it was in the portion just noted. Bivins had no objections to the charge and had no requested charges refused by the court. Be that as it may, the Texas cases make clear that Gulf would not be liable for failure to provide a ladder if Bivins realized that this left him with no escapeway from the cellar and yet went into the cellar of his own volition. See *McKee v. Patterson*, 153 Tex. 517, 271 S.W. 2d 391. Gulf would be under no obligation to warn of such an open and obvious condition. *McKee v. Patterson, supra; Smith v. Henger, supra.*

The conclusions we reach require that we reverse the judgment of the trial court and here render judgment for the defendant, Gulf Oil Corporation.

REVERSED AND RENDERED.

BROWN, Circuit Judge, concurring in part and dissenting in part.

I respectfully dissent as to the holding of the Court:

> "We are persuaded by both precedent and principle that the owner or occupier of particular property has a duty to warn the employees of an independent contractor who has undertaken to do work on the property, of dangers that are hidden on or inhere in that property, and that this duty is discharged if those in charge of the work for the independent contractor are given warning or have knowledge of the danger."

This includes, of course, the reversal and rendition flowing from the adoption of this decisive rule of law. I concur in the Court's discussion of the nature of the duties of an

occupier leading to the conclusion that Gulf owed a duty to Bivins. I concur also as to the other action taken and the supporting reasons so persuasively advanced by the Court.

As to the limited, but decisive, issue on which we differ, the Court quite properly characterized the "decisive question" to be whether "the duty of Gulf to [warn] Bivins" was "discharged by the warning given to White and his job foreman?"

It is because the rule announced is stated in such positive and precise and conclusive terms that I feel compelled to register my disagreement. It transcends this case and is and will be—so long as it stands—a formidable lessening of the duty of an occupier to exercise reasonable care to make the premises safe for employees of independent contractors.

At the outset it bears emphasis that the rule now formulated for the first time eliminates the necessity for a warning altogether. The rule does not require a warning by the occupier to the independent contractor. Under it the exoneration of the occupier from liability is not conditioned upon proving that warning was given to the independent contractor. As stated, the rule does, of course, establish that such warning is an insulation. But as expressed in the rule the non-liability is automatic not because (a) warning was given to the independent contractor, or (b) the hazard was known to the injured employee. Rather it is automatic if "those in charge of the work for

the independent contractor * * * have knowledge of the danger."

The occupier is thus automatically excused in advance from the necessity of considering the nature of the hazard, the unusual of spectacular capacity of the agency to cause extraordinary harm, the likelihood that employees will not know of the hazard, or the likelihood that a suitable warning will be passed on by the "knowing" independent contractor to employees ignorant of this knowledge. If it turns out that the independent contractor had knowledge, the occupier is home free notwithstanding the circumstances might have shown extreme danger to innocent workmen with no general likelihood that the employer-independent contractor would know of such hazards. Considering that tort law is a judge-made sanction to a developing public policy to protect persons from harm, one can hardly regard a rule as sound if its application depends on fortuitous chance not related to the principle of ordinary prudence.

This and other aspects of the application of the rule to be discussed later cause me to wonder how it is that, as just another Texas court, *Erie R. Co. v. Tompkins*, 1938, 304 U.S. 64, 58 S.Ct. 817, 82 L. Ed. 1188; *Guaranty Trust Co. v. New York*, 1945, 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, we arrive at this decision.

Where *Erie* leads, there must we, of course, follow. What are the markers employed here? The comment in Baylor

Law Review[a] adds little. With extreme caution it suggests the *possible* rule but recognizes that it is not free from doubt. And for its basis, it cites the cases discussed by the Court's opinion.[b] The *Reinle* case is, of course, diametrically opposed to the conclusion we reach. The basis for rejecting *Reinle* is that *Nance*, note *b supra*, points in the other direction. We must, of course, regard intermediate appellate courts and as we make our *Erie* way, what they say we must apply with equal fidelity unless it seems quite positive that the highest state court will reject it.[c]

In this situation I do not think we have any such evidence that *Nance* overrules the past. First, the *Reinle* case is still very much alive. As recently as 1950 in *Smith v. Henger*, 1950, 148 Tex. 456, 226 S.W. 2d 425, 431, it was cited by the Supreme Court of Texas in a context of the duty of an occupier to employees of independent contractors. Second, *Nance* had a whole series of grounds for holding the alleged vicarious occupier not liable as a matter of law. The first was actual knowledge which the plaintiff Flowers had of the large overhead line strung on H towers.

[a]Comment, The Duty to Furnish a Safe Place to Work to the Independent Contractor and His Servants, 11 BAYLOR L. REV. 170 (1959).

[b]McKee v. Patterson, 1954, 153 Tex. 517, 271 S. W. 2d 391; Nance v. Exploration Co. v. Texas Employers' Ins. Assn., Tex. Civ. App., 1957, 305 S. W. 2d 662 (error ref'd N. R. E.); Galveston-Houston Electric Ry. Co. v. Reinle, Tex. Civ. App., 1924, 264 S. W. 783. The author does not cite the previous and authoritative ruling by the Supreme Court on certified questions in *Reinle*, Galveston-Houston Electric Ry. Co. v. Reinle, 1924, 113 Tex. 456, 258 S. W. 803. The Court's reference and quotation is to the Supreme Court's opinion.

[c]West v. American Telephone & Telegraph Co., 1940, 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139; Six Companies of California v. Joint Highway District, 1940, 311 U. S. 180, 61 S. Ct. 186, 85 L. Ed. 114; Stoner v. New York Life Ins. Co., 1940, 311 U. S. 464, 61 S. Ct. 336, 85 L. Ed. 284; Fidelity Union Trust Co. v. Field, 1940, 311 U. S. 169, 61 S. Ct. 176, 85 L. Ed. 109.

Second, by its very structure and the size of the wires strung on the towers, Flowers either knew or should have known of the obvious and open hazard of the drilling rig coming into contact with one of the wires. This invoked the principle elucidated in *McKee v. Patterson*, note *b supra*. Third, the defendant sued as the alleged vicarious occupier was not one in fact since the defendant Geophysical Company was in no sense responsible for, or had anything to do with the high power electric line strung and maintained by the utility company. Thrown in as a fourth reason was the asserted rule that the notice to, or knowledge of, the independent contractor insulated the occupier from further concern, responsibility or liability.

The notation of the Supreme Court "Refused N.R.E." (no reversible error) in refusing to grant a writ of error and review *Nance* indicates that Supreme Court action was confined merely to an approval of the result, not an approval of the reasons or the Court's opinion as would be the case with a writ denied "Refused."[d] Hence the Supreme Court could have approved the result on any number of the reasons advanced for the decision.

[d]Rule 483, Tex. R. Civ. Proc.:

"In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation 'Refused'. In all cases where the Supreme Court is not satisfied with the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the notation 'Refused. No Reversible Error'. * * *." See "Notations on Applications for Writs of Error" by Gordon Simpson, Associate Justice Texas Supreme Court, 1945-1949, 12 TEXAS BAR J. 547 at 574-575 (1949); Simpson, "Problems of Precedent Affecting Court of Civil Appeals Opinions," 4 SOUTHWESTERN L. J. 398, 402-3.

As a technical *Erie* situation, I think that we are not free—whatever our own convictions—to reach this decision. If, as the Court seems to assume from its extended treatment of non-Texas cases, the decision is to be reached after being "persuaded by both precedent and principle" the result is, to me, even more unsound.

It warrants repeating that the rule stated with this articulate precision excludes altogether any inquiry into due care on the part of the occupier. The rule is simple and positive and absolute: if the occupier gives notice of a hazard to the independent contractor, that is all that is required. Under this rule, stated now with awesome finality for all time to come, it does not matter what the kind or type of hazard it is. It does not matter how grave may be the consequences of injury. It does not matter whether in the light of either of these two factors, a prudent occupier would not trust to the independent contractor the essential relaying of the warning to its employees.

A moment's reflection is convincing, at least to me, that such an absolute rule cannot be sound. The industrial scientific world now stands on the threshold of a new and rapidly developing era of nuclear energy. Power of these still unexplored forces is scarcely known. But as with each mechanical development of the industrial revolution, it is known that these modern miracles bring in their train hazards and risks of parallel proportion. Law, of course, cannot divorce itself from these influences, and if it sought to do so, it would no longer be law—certainly not living law. The internal combustion engine did more than merely

silence the pipes of Pan.[5] It and the competitive sources of steam, electric and hydraulic power, the irrepressible search for efficient fuels with which to meet the insatiable demands of this complex, the production of industrial commodities for consumption or use in further manufacturing, are some of the principal factors bringing into being the modern concept of inherently dangerous goods. The essence of it is that in view of the extraordinary capacity for severe harm, the superior knowledge of those close to the operation, the likelihood that persons exposed to harm will be ignorant of the risks, responsibility is put on one who introduces the thing into the channels of business, and due care is measured against the potential consequences. Indeed, it is just such factors which leads this Court to recognize that since "the evidence * * * would support the findings * * * that the premises contained an inherent, concealed or latent danger" unknown to the plaintiff Bivins, "there arose a duty of Gulf to warn" him.

It takes no special education to remind all of the destructive capacity of nuclear energy when loosed on such a mission. But the peaceful uses of the atom are, or may be, fraught with risks equally portentous.[6] From the handling of fissionable materials arises an acute apprehension of the

[5] Lord Simonds, Lord High Chancellor of Great Britain, Address to the American Bar Association, 39 ABAJ 1062, 1116 (1953), "* * * [T]here are many who sigh for a more Arcadian simplicity of life. But in Arcadia, the sound of the internal combustion engine had not silenced the pipes of Pan; it is vain to seek pastoral ease in the hearts of great industrial cities."

[6] See "The Feasibility of an Atomic Energy Compact for the Southern States," The Southwestern Legal Foundation, Dallas, Sept., 1958, a special research project in response to the request of the Southern Governors Conference; Gillet, "Insurance Torts and the Atom," 26 Ins. Counsel J. 17 (Jan. 1959); McNeal, "What and When of Atomic Liability," 26 Ins. Counsel J. 21 (Jan. 1959).

existence and as yet unknown consequence of radiation. The fear is not limited to likelihood of immediate harm to those within the operational zone of danger. Its impact may be imperceptible and slow in coming. And there is great concern that it ends with the person initially exposed.

It is true, of course, that Bivins was not hurt by these modern scientific miracles. But these factors are relevant in testing a rule stated with an awesome absolutism that warning by the occupier to the independent contractor is, as a matter of law, always and everywhere a complete insulation from liability for harm done to an innocent employee.

One can hardly believe that when putting fissionable materials into the channels of trade, a manufacturer or a distributor (or an occupier who contracts with an independent contractor for its use) can content himself as a matter of law with a notice or warning to his immediate customer. When the consequences for harm are so devastatingly spectacular, both as to those living and perhaps those not yet even conceived, will a routine letter warning be the final measure of operational and legal liability? Must not the law reckon with the facts in a particular case to ascertain whether, with the omnious threat of such destruction, a prudent person would rest content on the assumption—or hope—that all in the successive chain would be adequately warned? Would not this be measured, in part at least, by whether the one to whom the "warning" is given has a really adequate understanding of the forces at work, the

unique circumstances which make danger more, not less, likely, and the steps to be taken at each successive level if things go wrong?

What I am trying to say is simply this. There are three possible rules. The first was that impliedly followed by the trial court which seems to ignore altogether the fact or significance of a warning by the occupier to the independent contractor. The second, is the rule announced by the majority which makes such a warning always and everywhere an automatic bar as a matter of law. The third, and middle ground, is the one I advance—whether as a fact in each particular case a prudent occupier in the position of the defendant would reasonably have concluded that the particular warning to the independent contractor would in all likelihood be brought home sufficiently to employees who might otherwise be ignorant of the danger.

This is, I submit, the very essence of §343 of the Restatement of Torts so often embraced by Texas courts and repeated by the majority at some length. The occupier has a liability if he "(a) knows, or * * * could discover * * *" the condition which he should realize involves "an unreasonable risk" to employees of independent contractors and he "(b) has [1] no reason to believe that they [2] will discover the condition or [3] realize the risk involved therein * * *."[4]

This necessarily measures responsibility initially from the defendant-occupier's point of view. That is what this

[4]Brackets inserted for ease in reference.

Court spelled[b] out in *Gulf Oil Corp. v. Wright*, 5 Cir., 1956, 236 F. 2d 46. There this Court held that in view of the widespread knowledge at this late date of the known presence and dangers of hydrogen sulfide gas in the West Texas oil fields, a prudent occupier could not reasonably have expected that its independent contractor or the employees thereof would be ignorant either of the presence of the gas or its toxic effects. But it was there measured against the facts of that case. So much so was it that we sounded the caveat that on remand ultimate decision would depend upon the facts of the new trial there ordered.

Here the Court announces a rule which is both internally inconsistent and in conflict with the traditional, and here Texas, approach. As to Restatement §343(a), the Court recognizes that it was a jury issue whether the iron sulfide gas was present and was a danger of which Bivins was ignorant. In other words, this was tested by the facts. But it then abandons the factual inquiry for jury resolution as to the same kind of issues presented in §343(b). In the very nature of things, is not the question whether the occupier "[1] has no reason to believe" one of fact? By the same token, is not an inquiry whether the employees "[2]

[b]There we said: "This measures it upon the objective standard of what the defendant could reasonably expect others to know. The duty is " * * to warn such persons of the existence of dangers which could not reasonably be *expected* to be apparent or obvious * * *. Restatement, Torts, §343', Smith v. Henger, supra at 226 S. W. 2d 425, 431." To this was appended footnote 25 which stated: "Justice Calvert, McKee v. Patterson, supra, refers to Dean Keeton's Article 100 Pa. Law Review 629-648.

will discover the condition" an obvious one of fact, not law? Is it not even more so as to the crucial one whether the employees will "[3] realize the risk involved therein"?

It is entirely possible that on the record of a particular case reasonable minds could accept only the conclusion that a prudent occupier, having given notice of the peculiar hazard, would not have reason to believe that the employees would be ignorant of the condition or its hazards. In that situation a directed verdict would be compelled. But ordinarily it will not be, as the Court now announces, a decision as a matter of law. What a prudent occupier "has reason to believe" depends on the total setting. This includes the nature or kind of dangerous condition, the kind or type of hazard presented, and a balancing of the possible capacity for harm of an extraordinary nature against the likelihood of the independent contractor effectively relaying the warning to his employees. This depends on facts. And where facts permit conflicting inferences, it is for the trier of fact, not the judge, to declare the result.

The Court, listing precedents for the rule announced, ignores altogether the cases to the contrary. Both the Ninth and Second Circuits reject this rule that notice to the independent contractor is either notice to the employee or cuts off his rights. *Sullivan v. Shell Oil*, 9 Cir., 1956, 234 F. 2d 733; *Anderson v. Lorentzen*, 2 Cir., 1947, 160 F. 2d 173. The *Sullivan* case from the Ninth Circuit is particularly persuasive since as that opinion reflects,

Texas and California concepts are parallel on the open and obvious danger and voluntary assumption of risk principles.

My concern about the decision of the Court here as a precedent arises because the majority states this rule in such precise, positive, unyielding and absolute terms. What this may lead to is demonstrated by the case on which the majority places such great reliance. *Storm v. New York Telephone Company*, 270 N.Y. 103, 200 N.E. 659. There the defendant telephone company owned and maintained a line of poles. The utility company had, as lessee, fixed its crossarms and strung its wires on these poles. The entire line was being abandoned because the poles were rotten and deteriorated. The plaintiff, an employee of the utility company, was injured while engaged in removing the utility crossarms from one of the last remaining defective poles. To dismantle fittings from poles which were being abandoned because they were rotten and deteriorated is a far cry from our case which the majority properly characterizes as one imposing "liability for concealed or latent condition of danger not incident to the work to be done."

As *Storm* proves, big oaks from little acorns grow. Reasons given for a correct disposition of *Storm* are now the foundation for application of a like sounding rule to a new and entirely different situation.

The rule of prudence applying to the occupier to give rise to the duty should apply as well in the determination

of the fulfillment (i.e., discharge) of the duty. That is a question of legal-fact, not a deliverance of law. I therefore dissent.

A true copy

Test:

EDWARD W. WADSWORTH

(SEAL) EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana

Jun 22 1960

APPENDIX B

JUDGMENT.

Extract from the Minutes of April 1, 1960

No. 17843

GULF OIL CORPORATION,

versus

KENNETH C. BIVINS.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and judgment is here rendered for defendant, Gulf Oil Corporation;

It is further ordered and adjudged that the appellee, Kenneth C. Bivins, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Brown, Circuit Judge, concurring in part and dissenting in part."

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17843

GULF OIL CORPORATION,

Appellant,

versus

KENNETH C. BIVINS,

Appellee.

Appeal from the United States District Court for the Western District of Texas.

ON PETITION FOR REHEARING

Before CAMERON, JONES and BROWN, Circuit Judges.

PER CURIAM:

IT IS ORDERED That the petition for rehearing in the above entitled and numbered cause be, and it is hereby DENIED.

BROWN, Circuit Judge, Dissenting.

Extract from the Minutes of May 9, 1960.

APPENDIX C

GALVESTON-HOUSTON ELECTRIC RY. Co., *et al.*

v.

REINLE, *et al.*,

258 S. W. 803.

(Supreme Court of Texas. Feb. 13, 1924)
(Rehearing denied. March 12, 1924)

GREENWOOD, J. Question certified from the Court of Civil Appeals of the First Supreme Judicial District in an appeal from the district court of Galveston county. The Honorable Court of Civil Appeals at Galveston certified two questions to this court. It is agreed that one question has since become moot. For the purpose of determining the remaining question, the following statement from the certificate will suffice, viz.:

> The Gulf, Colorado & Santa Fé Railway Company, the Galveston, Houston & Henderson Railroad Company, and the Galveston, Harrisburg & San Antonio Railway Company, acting for themselves and for the county of Galveston, and for Galveston-Houston Electric Railway Company, hereinafter called the interurban company, entered into a contract with Larkin & Sangster, a corporation, to construct a portion of the causeway connecting Galveston Island with the mainland. By the terms of said contract Larkin & Sangster, corporation, obligated and bound itself to protect, indemnify, and save harmless the interurban and other railway companies, and any other person or persons, firm, or corporation claiming under them, including the causeway owners against all claims, rights, suits, or causes of action of every kind whatsoever which might be brought or lodged against it or them on account of personal injuries, death, loss or damage to property, or any other acts whatsoever growing out of, or connected with, or incident to, the

prosecution of the work undertaken by it by the contract.

"While this work of construction was being done the steam roads and the interurban used a single-track wooden pile trestle for the transportation of their trains, connecting the original arched bridge portion of the causeway with Galveston Island. A line of poles in order to carry the interurban wires supplying current to the interurban for running its cars was attached to arms extending over the track from these poles, and near the top of the poles attached to the opposite side of the track were three high-tension electric wires belonging to and used by the interurban uninsulated and carrying 33,000 volts of electricity. These wires were some 40 or 45 feet from the ground upon which one Willie S. Reinle was standing at the time he met his death.

"On March 21, 1919, Reinle was and for several months had been in the employ of Larkin & Sangster in the capacity of foreman of a gang of men operating a derrick, with an engine as a part thereof, used in making excavations for the foundation of the new piers which Larkin & Sangster were engaged in constructing. A wire rope or cable ran from the drums attached to the engine of the derrick over a pulley attached to the end of a boom, and thence down to or near the ground, at the ground end of which wire rope was attached a chain with a hook used for lifting buckets of excavated material or other substances. On the day on which he met his death, Reinle, who was in charge of the derrick, and who gave signals to the engineer being unable to see from his position in the engine house where the end of the derrick boom was located, signaled to the engineer to move the boom of the derrick in a direction toward the pile trestle, Reinle at that time holding onto the hook attached to the chain at the ground end of the wire rope running over the boom. The engin[illegible] moved the boom in accordance with Reinle's sign[illegible], and as a consequence the

boom swung so near to the high-tension 33,000 volt wires above referred to as to cause the wire rope to come in contact with or in such close proximity to one of said wires as to cause a current of electricity to flow down said wire rope and through Reinle's body, causing practically instantaneous death.

"Larkin & Sangster, who were parties to the suit, were independent contractors, and as such employed many men in the construction of said causeway.

"Mrs. Lillian W. Reinle, the widow of Willie S. Reinle, deceased, in behalf of herself and as next friend of Doris Reinle, an infant daughter of the deceased, Willie S. Reinle, brought this suit against the interurban company to recover damages for the death of said Willie S. Reinle. Among other things unnecessary to be mentioned, she alleged that Willie S. Reinle lost his life by reason of the negligence of the interurban company in failing to insulate its high-voltage wires, and in failing to give notice and warning to Reinle of the dangers attendant upon coming in contact with or in close proximity to said wires."

"The cause was submitted to a jury upon special issues, and in answer to special issues Nos. 1, 2, 3, and 4 they found substantially as follows:

"Answer to No. 1: The interurban company was not guilty of negligence in maintaining its high-voltage wires in an uninsulated condition at and along the causeway where Reinle was killed.

"Answer to No. 2: The interurban company did not use ordinary care to give Reinle notice and warning of the danger attendant upon coming in close proximity to the high-voltage uninsulated wires belonging to said company.

"Answer to No. 3: The interurban company did not use ordinary care to give Reinle notice and warning of the danger of coming in contact with the uninsulated wires of said company.

"Answer to No. 4: The failure on the part of the

interurban company to give Reinle notice and warning of the dangers mentioned in answers to Nos. 2 and 3 was the proximate cause of the death of Reinle.

"Upon these answers judgment was rendered in favor of the plaintiffs against the interurban company. On appeal to this court the interurban company presents the following proposition:

"Recovery of damages based on negligence is allowed only where there has been a breach of a legal duty by the defendant to the plaintiff, and, the undisputed evidence showing that Larkin & Sangster, Inc., the causeway contractor, was an independent contractor as to this appellant for the purpose of reconstructing the causeway, and that such independent contractor was fully advised and absolutely knew of the danger to its employés if machinery under their control was allowed to come into contact with or close proximity to the unsulated wires of this appellant, this appellant owed no duty to Willie Stephen Reinle, one of the employés of Larkin & Sangster, Inc., to give him warning or instruction as to such danger. The fact that the wires were uninsulated being also fully known by Larkin & Sangster, and it being an independent contractor, no duty was owed by this appellant to the employés of the independent contractor to insulate the wires. There being, therefore, no duty on this appellant in either of the respects above mentioned, and these being the sole grounds of negligence alleged against it by appellees, there was no basis in the evidence for the submission of any issue in appellee's favor against the interurban, and the peremptory instruction in its favor should have been given."

The question which the Court of Civil Appeals deemed it advisable to certify is:

"The undisputed evidence showing that Larkin & Sangster, the causeway contractor, was an independent contractor as to the appellant interurban company for the construction of the causeway, was such appel-

> lant resting under any legal duty to Willie S. Reinle, deceased, to give him warning or notice as to the danger incident to permitting the boom, being operated under his direction as an employee of Larkin & Sangster, coming in contact with or in the close proximity to the high-voltage wires of said appellant?"

[1] The nature of the work which the interurban company contracted for Larkin & Sangster to have performed necessitated the employment by the contractor of men within a zone of extreme danger created by the high-tension wires. The contract involved an invitation by the interurban company to the contractor's employees to labor within the danger zone. How imminent the peril was cannot be questioned in the light of the testimony of the interurban company's superintendent as set out in the company's brief. The facts, therefore, bring the case within the rule that one cannot, for his own advantage, invite others to come on, or to remain about, premises in his possession and under control, without using proper care to give warning of a grave danger to be probably there encountered, of which the invitees may have no knowledge.

Judge Cooley, for the Supreme Court of Michigan, said:

> "Every man who expressly or by implication invites others to come upon his premises, assumes to all who accept the invitation the duty to warn them of any danger in coming which he knows of or ought to know of, and of which they are not aware." Samuelson v. Cleveland Iron Mining Co., 49 Mich. 170, 13 N. W. 501, 43 Am. Rep. 456.

Judge Strong, for the Texas Commission of Appeals, stated the general rule to be:

> "The owner or occupant of real property is under no obligation to make it safe for the benefit of tres-

> passers, intruders, or mere licensees coming upon it without his invitation, expressed or implied. If, however, such owner or occupant invites the public or particular members of it to come upon his premises, he owes to such persons the duty to have same in a reasonably safe condition and to give warning of latent or concealed perils." Bustillos v. Southwestern Portland Cement Co., 211 S. W. 929.

The statement accords with the opinion of this court in City of Greenville v. Pitts, 102 Tex. 3, 107 S. W. 50, 14 L. R. A. (N. S.) 979, 132 Am. St. Rep. 843, and with the opinion of the United States Supreme Court in Bennett v. L. & N. R. Co., 102 U. S. 577, 26 L. Ed. 235, 236.

Texas Traction Co. v. George, 149 S. W. 438, is relied upon as the only Texas case in point to sustain the proposition advanced in behalf of the interurban company. The case was decided by the Dallas Court of Civil Appeals. A writ of error was denied. The Court of Civil Appeals made express findings of fact: First, that there was no ground of negligence alleged which was unknown to George, for whose death damages were sought of the Traction Company; and, second, that the work which George was doing was not dangerous in itself, and could easily have been done without coming in contact with the wires charged with electricity. The decision was that—

> "Under this state of facts, we think it cannot reasonably be said that the Texas Traction Company knowingly set in operation causes dangerous to the person of the deceased, without exercising the proper precaution to anticipate and prevent injury to him."

It is because the facts on which the certified question is based are so different that no conclusion similar to that in

George's Case can be reached herein. The facts of this case, as certified, warrant the conclusion that the interurban company was knowingly keeping in operation a force inherently dangerous to the person of Reinle in the regular performance, with necessary machinery, of his duty as an employee of Larkin & Sangster, without exercising due care to prevent his injury or death.

The opinion of the Texas Commission of Appeals in the case of George W. Armstrong Co. v. Adair, 112 Tex. 439, 247 S. W. 851, was recently adopted by the Supreme Court. It was there declared to be the duty of a company controlling premises on which one could not come without incurring a danger inhering in the premises to exercise ordinary care towards any person invited by the company to remain about the premises, with respect to the giving of such warning as might be reasonably necessary to enable the invitee to escape harm.

The obligation resting on the user of wires highly charged with electricity to exercise reasonable care to avoid injury to all known to be rightfully coming into a place of danger from such wires, especially when coming to render a service beneficial to the user of the wires, is thus stated in 9 R. C. L. p. 1206, § 16, viz.:

> "This duty of using the necessary skill and prudence to prevent injury to persons coming in contact with their wires is imposed upon electric companies, not only as regards the public generally, but also with respect to any individual engaged in a lawful occupation in a place where he is entitled to be. Such persons are not trespassers or licensees bound to take the premises in the condition in which they find them."

To the same effect, see Ennis v. Gray, 87 Hun. 360, 34 N. Y. Supp. 379; Clements v. Louisiana Electric Light Co., 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 44, 32 Am. St. Rep. 348; Illingsworth v. Boston Electric Line, 161 Mass. 583, 37 N. E. 778, 25 L. R. A. 553.

The distinction between this case and those denying recovery against an employer for negligence of the independent contractor is stated by the Supreme Court of New Hampshire in Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co., 71 N. H. 530, 53 Atl. 809, 60 L. R. A. 116, in the following language:

> "The rule is that, where the liability sought to be enforced is based upon the principle of respondeat superior, if the person for whose negligence recovery is sought is himself an independent contractor, or the employee of one over whom as to the detail of his work the defendant has no control, liability cannot be enforced by invoking that doctrine. But, where the duty sought to be enforced is one imposed by law upon the defendant, he cannot escape liability by showing that he employed another, over whom he had no control, to perform it for him."

The Supreme Judicial Court of Massachusetts in the case of Cobat v. Kingman, 166 Mass. 403, 406, 44 N. E. 344 and 345, 33 L. R. A. 45, declared:

> "Ever since Quarman v. Burnett, 6 Mees. & W. 499, it has been considered settled law that one employing another is not liable for his collateral negligence, unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching to him, of seeing that duty performed, by delegat-

> ing it to a contractor. He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it."

There is no doubt that the independent contractor was under the duty to exercise ordinary care to give warning to its employees of the dangers incident to their work from proximity of the appliances with which they were required to labor to the deadly electric current carried by the interurban company's wires. Breach of this duty is not the basis of the interurban company's liability. It is the breach of the interurban company's own independent duty for which it is answerable. Failure of the contractor to perform its duty would in no wise relieve the interurban company from responsibility for the consequences of failure to perform its own duty to the contractor's employees.

The reason for the employer's liability for an injury occasioned like Reinle's is stated in Cooley on Torts to be:

> "If I employ a contractor to do a job of work for me which, in the progress of its execution, obviously exposes others to unusual perils, I ought, I think, to be responsible, * * * for I cause acts to be done which naturally expose others to injury." 2 Cooley on Torts (3d Ed.) p. 1091.

[2] The court answers that it was the duty of the interurban company to exercise ordinary care to give Reinle notice or warning of the danger of the boom coming in contact with, or in close proximity to, the uninsulated high-voltage wires, notwithstanding Reinle was an employee not of the interurban company, but of the independent contractor, who possessed full knowledge of the danger.

HISTORY TO DATE

of

GALVESTON-HOUSTON ELECTRIC RY. CO. *v.* REINLE *(Tex. S. Ct., 1924), 258 S. W. 783.*

Authorities Citing Reinle

No.	Style	Appellate Court	Tex. S. Ct.	How Cited	Comment
State Authorities					
1.	Same Case.	264 S. W. 783		As authority	Rev'd. on other grounds (necessary parties).
2.	Houston E. & W. T. R. Co. v. Jones (1928)	1 S. W. 2d 743, 746	Error Refused	As authority	Public invitees involved here.
3.	West Texas Utilities Co. v. Renner (1930)	32 S. W. 2d 264, 268	53 S. W. 2d 451, 453	As authority	Rev'd. by S. Ct. due to improper argument of counsel; law as to warning per *Reinle* correct.
4.	Banker v. McLaughlin (1948)		208 S. W. 2d 843, 847	As authority	Quoted from *Reinle* as to duty to warn invitees.
5.	Smith v. Henger (1949)		226 S. W. 2d 425, 431	With Approval	Discussed in Petition, supra, p. 10.
6.	Cornett v. Hardy (1951)	241 S. W. 2d 186, 190		With Approval	Occupier not involved.
7.	Texas Electric Service Co. v. Holt (1952)	249 S. W. 2d 662, 667	Error Refused; No Reversible Error.	As Authority	Occupier must warn *employee* of danger.
8.	Nance Exploration Co. v. Texas Employers' Ins. Assn. (1957)	305 S. W. 2d 627	Error Refused; No Reversible Error.	With Approval; Distinguished on the facts.	Discussion in Petition, supra, p. 7; here, Defendant was neither owner nor occupier in control.

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Authorities Citing Reinle

No.	Style	Appellate Court	Tex. S. Ct.	How Cited	Comment
9.	Houston Lighting and Power Co. v. Brooks (1958)	319 S. W. 2d 427, 431		With approval	
10.	Same as 9. (1960)		S. W. 2d (3 Tex. S. Ct. Journal 387)	With approval	Discussed in Petition, supra, p. 10; see Appendix E., p. 63 where *Reinle* discussed.
Federal Authorities					
1.	American General Ins. Co. v. Southern Gas & Electric Co. (5 Cir., 1940)	115 F. 2d 706, 708		With approval	Distinguished.
2.	Crow v. Continental Oil Co. (5 Cir., 1940)	115 F. 2d 740, 742		As authority	Invitor must use "* * * proper care to give warning of a grave danger * * *."
3.	Holt v. Texas-New Mexico Pipeline Co. (5 Cir., 1944)	145 F. 2d 862	Cert. Den., 325 U. S. 879	As authority	Where intrinsically dangerous work is to be done, one for whose benefit it is done owes duty of "highest degree of care to prevent injury, which duty may not be delegated."
4.	Union Tank & Supply Co. v. Kelley (5 Cir., 1948)	167 F. 2d 811, 816	Cert. Den., 335 U. S. 827	With approval	Distinguished *Reinle*, but cited it for "intrinsically dangerous" cases involving "unusual perils".

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APPENDIX E

Opinion of the Supreme Court of Texas

in

HOUSTON LIGHTING AND POWER CO.

v.

BROOKS

3 Tex. S. Ct. Journal 387, S. W. 2d

No. A-7186

From Harris County, First District.

Writ of error granted October 7, 1959. (3 TSCJ 8.) (Opinion of CCA, 319 S. W. 2d 427.)

Judgments of the Court of Civil Appeals and District Court reversed, and judgment rendered for petitioner. (Opinion of the Court by Associate Justice Hamilton.)

For Petitioner: Andrews, Kurth, Campbell & Bradley, F. L. Andrews, William H. Tenison, Jr., and Bass C. Wallace, Houston.

For Respondent: McGregor, Sewell & Junell, William L. Bowers, Jr., Helm, Jones, McDermott & Pletcher, Raymond L. McDermott, Albert P. Jones and Mabel G. Howell, Houston.

* * * * *

This is a suit for damages for personal injuries growing out of an electrical contact made by respondent Brooks (plaintiff in the trial court) with a high-voltage line owned

and maintained by petitioner, Houston Lighting & Power Company (defendant in the trial court). The trial court entered judgment based on a jury verdict in favor of respondent, out of which judgment was decreed to the Travelers Insurance Company, compensation insurance carrier, the amount it had paid respondent for his injury and medical expenses. Petitioner had moved for an instructed verdict at the close of respondent's case, and later for judgment non obstante veredicto, which motions were overruled. Petitioner appealed to the Court of Civil Appeals and the judgment of the trial court was there affirmed. 319 S. W. 2d 427.

The case is now before us on writ of error brought by petitioner, Houston Lighting & Power Company.

On December 29, 1953, respondent, a cement finisher by trade, was working for his employer, Texas Gulf Construction Company, on a building known as the Heights Hospital Annex. At such time petitioner owned, operated and maintained under a franchise from the City of Houston near said construction project high-voltage electrical transmission lines composing a circuit carrying 12,000 volts of electricity. Said lines ran along the west side of Ashland Street and parallel to and east of the Heights Hospital Annex. The lines in question were approximately 34 feet above street level and more than eight feet higher than the floor upon which respondent was working at the time of injury, and more than eight feet from the east wall of the annex, but less than eight feet from the vertical plane of the outside edge of a three-foot wide canopy on the

annex several feet lower than the third floor of the building. There was testimony that while respondent was holding the mop handle about three feet from the floor with about twelve or thirteen feet sticking out behind him smoothing the concrete with his back toward Ashland Street and said wires, the mop handle created an electrical contact with the nearest high-voltage wire, thereby causing respondent's injuries. The concrete was wet and it was necessary to work it fast, as otherwise it might set before being smoothed out. It was stipulated that neither petitioner nor respondent's employer had at any time directly or indirectly warned respondent about any electrical lines on the east side of the annex. Respondent testified he had been running the mop east and west with his back to Ashland Street about fifteen minutes before the accident, and that he had no reason to look behind him, and did not see the wires; if he had seen them he would have assumed they were dead. He had been working spreading concrete on this floor from which the lines were plainly visible, for about two and a half or three hours that morning. There was evidence that petitioner knew the construction work was going on at the Heights Hospital Annex. It was also shown that petitioner's supervisor of street lighting and maintenance operation in Harris County had gone to the job site to do some work on a transformer in connection with the construction of the annex two or three days prior to the time respondent was injured. At that time the state of the construction of the annex was substantially the same as at the time of the injury. Petitioner had owned, operated and

maintained its high-voltage transmission lines for many years in the same physical location in which they were prior to the construction of the Hospital Annex. Petitioner offered evidence, which was undisputed, that it was the custom of petitioner to move, de-energize or otherwise protect its lines whenever requested to do so by contractors or building owners, and on their agreement to defray the cost of such work. There was no evidence in this case that any such request of petitioner was made prior to the accident in question.

Petitioner, among other points, predicates its appeal upon the proposition that it did not owe any duty to respondent to remove or de-energize its electric lines or to warn him that such lines were not de-energized because it could not be reasonably foreseen that a workman on that building would come into contact with petitioner's wires and thereby be injured. It is our holding that there is no evidence in this case establishing the fact that petitioner could reasonably foresee that a workman on the building in question would make a contact with its lines and thereby be injured, and therefore no negligence was established on the part of petitioner.

The respondent does not rely upon a violation of the National Electrical Safety Code for recovery, and the Court of Civil Appeals does not base its holding on a violation thereof. However, the question has been raised in the briefs, and we think it desirable at the outset that we clarify the matter by saying that the lines of petitioner were properly located in compliance with the ordinance of the City of

Houston and Article 1436a, V.A.C.S., which incorporates the National Electrical Safety Code. It appears that the minimum requirements in so far as they are applicable here have been complied with, that is, that the nearest line of petitioner carrying 12,000 volts of electricity has a clearance of more than eight feet from the top of said building and more than eight feet from its side.

For further clarification, since the relationship of the parties is important in determining the duty owed by one party to the other, we wish to point out that under the undisputed facts that whatever duty is owed respondent by petitioner is as a member of the public and not as an employee or as an invitee of petitioner.

The Court of Civil Appeals, in discussing the matter of foreseeability, stated that since the petitioner knew the state of construction of the annex it either knew or was charged with notice that some employee working on such construction job might in some manner contact its wires with a conductor of electricity and sustain serious injury therefrom. And further, under the circumstances petitioner was charged with the duty of removing or de-energizing the lines in question, or of giving warning of the grave danger involved in contacting such wires. It made this holding regardless of having found that petitioner probably neither knew that concrete was going to be poured and worked on the day of the accident nor that a fifteen or sixteen foot aluminum handled mop would be used. The court recognizes in its opinion that in the absence of actual knowledge on the part of petitioner of the dangerous situa-

tion which arose on the occasion in question such facts must be shown as would amount to constructive knowledge on the part of petitioner as to the hazardous situation. It arrived at its holding of constructive knowledge on the part of petitioner by reasoning that since petitioner knew of the plans for the construction of the building and had followed the progress of the construction it could reasonably anticipate the next stages thereof, that is, the time for the pouring of the concrete on top of the second floor, and that the petitioner was presumed to know what is commonly known, that in such construction concrete floors are smoothed with mops, and therefore could reasonably anticipate the use of the long-handled mop with which the hazard with petitioner's lines was created. In the first place, the evidence shows concrete finishing is a highly specialized job, and we are not willing to say that the kind of instruments used and the manner of their use in concrete finishing is common knowledge, and this court will not take judicial knowledge of such.

On the matter of petitioner's being charged with reasonably anticipating the next stages of construction of the building, we have searched the record to find out just how much petitioner knew about that construction. It appears that petitioner through its employees was interested in supplying electricity to the contractor during the construction of the annex on a temporary basis, and in supplying electricity permanently for the completed building. In connection with furnishing electricity petitioner examined blueprints of the building and employees were on the build-

ing site from time to time in connection with supplying electricity, but it appears that petitioner's and its employees' only interest in the building was in supplying electricity, and whatever knowledge they had of the building construction was incidental to furnishing electricity. There is nothing in the record to show any concern over the progress of the building from a structural standpoint on the part of petitioner or its employees. The record wholly fails to show any facts which would be a basis for holding that petitioner could reasonably anticipate the time for pouring concrete on top of the second floor. Of course petitioner knew the location of the lines in relation to the building, but since they were properly located in accordance with the National Electrical Safety Code the knowledge of such location in itself gave no reason to anticipate danger to respondent. Respondent wholly failed to establish any reason why petitioner should anticipate the injury of which he complains.

If the reason to anticipate injury is not established, then no duty arises to act to prevent such an unanticipated injury.

> "Negligence rests primarily upon two elements: (1) reason to anticipate injury, and (2) failure to perform the duty arising on account of that anticipation. The ability to have foreseen and prevented the harm is determinative of responsibility." 30-B Tex. Jur., p. 179, Sec. 8.

There is no evidence that petitioner in this instance had actual knowledge of probable danger to respondent, and

there are no facts in the record upon which to base constructive notice to petitioner. To hold petitioner liable under the facts of this case we would necessarily have to arbitrarily impute foresight to petitioner. It was said in Texas & Pacific Railway Co. v. Bigham, 90 Texas 223, 38 S. W. 162:

> "* * * a party should not be held responsible for the consequences of an act which ought not reasonably to have been foreseen. * * * it would seem that there is neither a legal nor moral obligation to guard against that which cannot be foreseen, and under such circumstances the duty of foresight should not be arbitrarily imputed."

Also, it was said in the case of City of Dallas v. Maxwell, 248 S. W. 667 (Com. App. opinion, approved by Supreme Court):

> "In this state it is now a settled doctrine that anticipation of consequences is a necessary element in determining not only whether a particular act or omission is actionably negligent, but also whether the injury complained of is proximately caused by such act or omission. Seale v. Railway, 65 Tex. 274, 57 Am. Rep. 602; Railway v. Bigham, 90 Tex. 223, 38 S. W. 162; Railway v. Bennett, 110 Tex. 270, 219 S. W. 197; Railway v. Behne (Tex. Com. App.), 231 S. W. 354. This doctrine is the result of an effort by the courts to avoid as far as possible the metaphysical and philosophical niceties in the age-old discussion of causation, and to lay down a rule of general application which will, as nearly as may be done by a general rule, apply a practical test, the test of common experience, to human conduct when determining legal rights and legal liability. Actual anticipation is of course not in any sense the test; but what one should

under the circumstances reasonably anticipate as consequences of his conduct."

The Court of Civil Appeals relies on the case of Texas Public Service Company v. Armstrong (Tex. Civ. App.), 37 S. W. 2d 294, writ refused, as authority for showing a breach of duty owed respondent by petitioner in this case. The facts of that case are not analogous to the facts of this case. In that case the defendant light company's wire ran from its pole in the alley across one Stephen Bell's property to a church 119 feet away. Clearly, the wire had been improperly maintained in that it had been allowed to sag to where it was resting on Bell's garage, which had a corrugated roof. The top of the garage was twelve feet from the ground. During a rainstorm the garage caught fire, evidently from the electric wire. Bell invited his neighbor, John Deary, to help him put out the fire. As Deary put his hand upon the roof of a side room attached to the garage, which roof extended down to within five feet of the ground, and attempted to climb upon said roof, it was so charged with electricity that he was immediately killed. The evidence showed that the wire had been resting on the top of this garage for about a year, and the friction from the wire rubbing on the garage had worn off the insulation.

The Court of Civil Appeals also cites West Texas Utilities Company v. Renner (Tex. Comm. App.), 53 S. W. 2d 451. In that case the plaintiff, employee of an independent contractor, was working on the roof of a structure being built on the premises for the use of the defendant, West Texas Utilities Company. The employee was an invitee of the

defendant West Texas Utilities Company and the court held that the company had a duty imposed upon it, not only to warn, but to use at least ordinary care to have the premises in a reasonably safe condition.

In the case of Galveston-Houston Electric Railway Company v. Reinle, 113 Texas 456, 258 S. W. 803, 805, also relied upon by the Court of Civil Appeals, the plaintiff Reinle was an invitee upon the premises of the electric railway company and was an employee of a contractor doing work for the defendant railway company. In holding the defendant liable in that case the court announced the rule:

> "One cannot for his own advantage invite others to come on or remain about premises in his possession and under his control without using proper care to give warning of a grave danger to be probably there encountered, of which the invitee may have no knowledge."

It appears that the statements from the cases relied upon by the Court of Civil Appeals are directly to instances where the injured party was either an employee of the defendant or was doing some work at the invitation of and beneficial to the defendant, or where the offending lines had been either impropery installed after the erection of the nearby structure, or had been improperly maintained. None of these circumstances were present here, and therefore the cases are not controlling.

In the case of American General Insurance Company et al. v. Southwestern Gas & Electric Company, 115 Fed. 2d 706, by the Fifth Circuit Court of Appeals, the deceased Jones had been an employee of a construction company

doing dragline work on a public highway in Rusk County, Texas. Defendant electric company had received notification several days before the accident of the intended work involving a dragline with a long boom in the vicinity of defendant's lines. Defendant even had an engigneer present at the place of the accident when the boom made an electrical contact with the lines while Jones was touching the base of it. The court affirmed the trial court's judgment for defendant and distinguished the Reinle case, supra, upon which the Court of Civil Appeals relies, as follows:

> "The appellants contend that Southwestern Gas & Electric Company was negligent in not warning Jones of the danger of the boom coming in contact with its wires, and that this negligence was the proximate cause of his death. They rely here, as they did in the court below, on the case of Galveston-Houston Electric Co. v. Reinle, 113 Tex. 456, 258 S. W. 803. That case is not controlling here. Reinle was an invitee upon the premises of the electric company and was an employee of a contractor doing work for the defendant. The court announced the rule that 'one cannot, for his own advantage, invite others to come on, or remain about, premises in his possession and under his control, without using proper care to give warning of a grave danger to be probably there encountered, of which the invitees may have no knowledge.' In the case at bar Jones was not an employee of the defendant electric company or of a contractor doing work for it. Jones was not engaged in any work beneficial to the defendant, and was in no wise an invitee of Southwestern Gas & Electric Company.
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> "* * * The plaintiffs have shown no negligence whatever on the part of the defendant. It is clear that

Southwestern Gas & Electric Company could not reasonably foresee that Texas Bitulithic Company would negligently run its metal crane against the high tension lines."

Respondent does not cite any Texas case holding the owner of previously franchised and established lines in accordance with the National Electrical Safety Code liable to a member of the public without there being shown some reason for the utility to anticipate danger to him, and we know of no such case. We hold that the accident and injuries complained of were not in a legal sense foreseeable consequences of the acts or omissions charged to petitioner, so whether we measure the duty by the measuring stick of foreseeability and say that the petitioner breached no duty it owed respondent and was therefore not negligent, or whether we say in any event petitioner's conduct was not in any of the respects complained of a proximate cause of the unforeseeable consequences, we arrive at the conclusion that liability was not established. See: Denison Light & Power Co. v. Patton, 105 Tex. 621, 154 S. W. 540; Hill v. Dallas Railway & Terminal Co. (Tex. Civ. App., 1951, error ref'd n.r.e.), 235 S. W. 2d 522; West Texas Utilities Co. v. Dunlap (Tex. Civ. App., 1943, no writ hist.), 175 S. W. 2d 749; Havens v. Dallas Power & Light Co. (Tex. Civ. App., 1953, error ref'd n.r.e.), 256 S. W. 2d 689; and Wilson v. Texas Electric Service Co. et al. (Tex. Civ. App., 1954, error ref'd n.r.e.), 265 S. W. 2d 624.

In view of the disposition we are making of this case we do not think it necessary to discuss the other points raised by petitioner.

The judgments of the Court of Civil Appeals and the trial court are reversed and judgment is here rendered for petitioner.

ROBERT W. HAMILTON,

Associate Justice.

Opinion delivered June 8, 1960.